United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1551

B pp's. $30

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Employees Union Pension Fund, a pension trust fund,

Plaintiffs-Appellees-Appellants,

—against—

KRAFTCO CORPORATION,

Defendant-Appellant-Appellee.

APPELLANT KRAFTCO CORPORATION'S ANSWERING BRIEF ON THE CROSS-APPEAL AND REPLY BRIEF ON THE APPEAL

SULLIVAN & CROMWELL
Attorneys for Appellant-Appellee
Kraftco Corporation
48 Wall Street
New York, N.Y. 10005

JOHN F. CANNON
Of Counsel

August 30, 1974

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

United States Court of Appeals

For the Second Circuit

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Employees Union Pension Fund, a pension trust fund,

Plaintiffs-Appellees-Appellants,

—against—

KRAFTCO CORPORATION,

Defendant-Appellant-Appellee.

APPELLANT KRAFTCO CORPORATION'S ANSWERING BRIEF ON THE CROSS-APPEAL AND REPLY BRIEF ON THE APPEAL

The bulk of the Brief of Plaintiffs-Appellees-Appellants ("P.Br.") is devoted to plaintiffs' effort on their cross-appeal to persuade this Court to reverse Judges Tyler and Lumbard and hold that paragraph 3 of the Breyer Agreement conferred upon the Segal Company's actuarial staff the authority to decide issues of contract interpretation which the Segal Company conceded must be resolved before any actuarial calculation is possible (122a), and which both Judges found are beyond the scope and expertise of an

actuary to decide (94a, 223a). Plaintiffs ask this Court to impose upon Kraftco the consequences of the Segal Company's first, thoughtless and clearly erroneous theory as to what parties had in mind; a theory which it ultimately admitted had no support in the contract language (115a).

Plaintiffs make only a brief (P.Br. 59-62) and completely ineffective attempt to answer Kraftco's showing in its brief on the appeal ("K.Br.") that Judge Lumbard clearly erred in his analysis of the evidence and that, accordingly, the judgment should be modified to conform to the Kraftco interpretation of the Breyer Agreement (K.Br. 34-45). Plaintiffs also fail to meet Kraftco's alternative request for a remand for a hearing on two points which Judge Lumbard improperly refused to consider (K. Br. 45-47).

The extended nature of the argument on the cross-appeal is caused by, or is designed to obscure, plaintiffs' failure to confront the fact that is their undoing, namely, that parties who select a corporate actuarial consulting firm to make an actuarial study do not thereby give the firm—or whichever of its staff of actuaries the firm happens to select to do the job—the unreviewable discretion to interpret their agreement and resolve ambiguities in their description of what the actuaries were to study.

The brevity—and unresponsiveness—of plaintiffs' efforts to deal with Kraftco's appeal reflect the fact that they really have no answer to it.*

---

* Since any further brief which plaintiffs may file must be limited to a reply to Kraftco's answer to the issues presented by their cross appeal (F.R.A.P. 28(c)), plaintiffs have presumably said all they feel they can say in answer to Kraftco's appeal.

I

Plaintiffs' Cross-Appeal Is Without Merit. The Breyer Agreement Was Susceptible of Different Interpretations. The Segal Company Did Not Have the Authority to Make the Choice Between Them. Plaintiff's Legal Arguments Are Beside the Point.

Plaintiffs point to the unambiguous aspect of paragraph 3 of the Breyer Agreement—which gave the Segal Company final and binding authority to decide matters of actuarial expertise—and assert that therefore all of paragraph 3 is unambiguous.

Sidestepping the fact that the authority of the Segal Company as actuarial consultants was limited to matters actuarial, plaintiffs label the Segal Company an appraiser and seek to broaden its authority by arguing analogies between appraisers and arbitrators. Having by this means invested the Segal Company with broad interpretive powers not conferred by the Breyer Agreement, they argue that the Segal Company had the power to resolve any ambiguity that may have existed.

But the Segal Company admitted (122a), and Judge Lumbard found accordingly (223a), that paragraph 3 of the Breyer Agreement was susceptible to multiple interpretations and that the Segal Company was unable as a matter of actuarial practice to select the one which conformed to the intent of the parties. Having no inapposite label or analogy with which to obscure that finding—and no basis for arguing that the finding was clearly erroneous—the plaintiffs simply record their dissent in a footnote (P. Br. 35).

A. The Nature of the Ambiguity

Plaintiffs' claim they are at a loss to see any ambiguity in paragraph 3 of the Breyer Agreement (P.Br. 31-35). They see it quite clearly but beg the question and refer to it as a dispute about "method of calculation" or "actuarial method" or "actuarial formula" (P.Br. 31, 34, 38).

Paragraph 3 called upon the Segal Company to apply its actuarial expertise to determine the effect ("impact"), if any, of a described cause ("the discontinuance of operations and the termination of employees" at the Breyer-Newark plant) upon "the pension fund", and it clearly stated the parties' understanding that in matters of actuarial expertise its decision would be conclusive ("final and binding").

In an effort to understand paragraph 3 one must look at "the pension fund" to which it refers. Central to "the nature of the Fund" (221a) was the fundamental understanding that the future economics of the New York City ice cream Industry *as a whole* could reasonably be expected—notwithstanding the ebb and flow of market factors affecting its individual members—to generate sufficient gross income to enable it to bear the cost of maintaining the pension system on a current cost basis into the indefinite future (75a-78a, 108a-109a), and that, although no employer would be legally bound beyond the term of the collective bargaining agreement in existence at any time (224a), it was reasonable to expect that new agreements would continue to be struck on the maintenance of the system. The threshold *factual* question to which the ambiguity relates is whether or not the parties to the Breyer Agreement intended to change this fundamental understanding ("the basic Industry assumption") for purposes of the actuarial study contemplated thereby.

The actuarial incidents of the pension system were predicated upon the basic Industry assumption (75a-78a, 108a-109a); but it was the employers and the employees through the unions as their bargaining representatives, not the Segal Company, who actually made the assumption, and on May 1, 1968, they agreed to continue it by agreeing that the pension program "previously instituted and the Employer contributions thereto shall be continued during the term of this Agreement" (290a). The actuarial predicates as to perpetual, fixed levels of employment and contributions, and the Segal Company's endorsement of a no-amortization funding program, are derived from the basic Industry asumption—what Judge Tyler referred to as "the basic decision not to amortize the accrued liability" (94a).

As Judge Lumbard said, the withdrawal of a group of employees and the termination of their employer's contributions could be significant enough to vitiate the reasonableness of the parties' reliance upon the basic Industry assumption (226a). But, as he also said, modest fluctuations would not be so regarded (225a). The question of intent reduces to whether for purposes of this actuarial study contemplated by the Breyer Agreement, Kraftco and the unions regarded the Newark change as being in the former category (the alternate interpretation) or the latter category (the Kraftco interpretation).

The Kraftco interpretation views the parties as having assumed no change in the basic Industry assumption and as having been concerned with the net effect, if any, of the retirement of eligible Newark employees earlier than anticipated, the termination of the others whose accrued pension benefits would now never vest, and the loss of contributions that would otherwise have been paid in respect of all those employees. It is clear, and significant, that any adverse effect upon the Pension Fund caused by the loss of the

particular employees, would occur without regard to the funding basis of the Pension Fund; it would gain or lose *solely* as a function of the age and service characteristics of the employees. The significance, of course, is that Irving Segal told Tom Parsonnet that Kraftco thought there would be no adverse effect because it had looked at the age and service characteristics of the employees and neither man suggested that the funding basis of the Pension Fund had anything to do with the matter (K.Br. 19-21).*

The alternate interpretation of paragraph 3 assumes that the parties viewed the closing as having caused, not only the effect associated with the premature termination of the employees actually involved, but also a never-to-be-recovered loss to the Industry of the number of jobs involved in the operation that was being permanently closed. This interpretation is inconsistent with the basic Industry assumption because it is predicated upon the notion that the closing of one small plant in 1968 would lead to an annual contribution deficit which the Industry could not be expected to absorb. Under this interpretation the annual loss would be equal to so much of anticipated future contributions in respect of such jobs as would have exceeded the cost of the benefits that would have been earned by the holders of such jobs and would therefore have been available to pay interest on the unfunded accrued liability.

The evidence demonstrates that the minds of the parties did not meet on such a conception of the problem (K. Br. 34-35; below, pages 13-17). It is appropriate to empha-

---

* The Segal Company rejected the Kraftco interpretation because it did not "take into account the pensioner burden left on the fund as a result of the closing" (123a). But the Pension Fund's obligations to all pensioners ($8,600,000) was fully covered by its assets ($10,400,000) (K.Br. 14; 340a-341a). The future "burden" with respect to active employees was not fully covered by existing assets but the basic Industry assumption was that this cost would be paid as it matured.

size the following points here: (1) a construction of the April 25, 1968 Breyer Agreement as having altered the basic Industry assumption, is inconsistent with the May 1, 1968 renewal of that assumption in the new collective bargaining agreement, and (2) a conception of the closing as having placed perpetual increased costs on other Pension Fund participants (241a-242a), is inconsistent with the fact that Kraftco continued in the Industry and no other employer had any greater obligation than it did to continue to contribute to the cost of the pension system. This latter point is what Judge Tyler meant when he found that the Segal Company had erred by imposing liability unequally upon Kraftco in view of its continued participation in the Pension Fund (94a).

The original approach of the Segal Company had no basis at all in the agreement. Without a whisper of justification in the text or context of the Breyer Agreement, the original approach went beyond the alternate approach and would have *reversed* 16 years of history (227a). Mr. Elkin sought to justify his action by stating (without elaboration as to circumstances) that other pension funds have agreed upon such a calculation (114a). But the question is whether there was any reason to find that such was agreed upon here. Clearly there is not, for as Mr. Elkin in the end sheepishly conceded, "the Agreement does not provide explicit guidance for a resolution of this particular issue" (115a).

Accordingly, there are but two interpretations which the language of the Breyer Agreement can be made to bear.*

---

* If the choice between the two possible meanings had to be resolved within the four corners of the Breyer Agreement, the Kraftco interpretation is the more reasonable. The words used cannot be read as implying subtle actuarial notions with respect

B. The Segal Company Was Not Given the Authority to Resolve the Ambiguity

Judge Tyler's key findings, with which Judge Lumbard fully agreed (229a-230a), were that the Breyer Agreement's direction to the Segal Company was ambiguous ("inadvertently broad, easily susceptible to misunderstanding" (94a)) and that it was not the intention of the parties "to submit to Segal & Co. a problem of interpretation which exceeds the traditional scope and expertise of an actuary" (*id.*). The choice between the Kraftco and alternate interpretations turns upon whether in fact *the parties* saw the Newark closing as vitiating the basic Industry assumption and is not a mater of actuarial expertise.

The Segal Company's redetermination (107a-113a) and the Bassett affidavit (75a-78a) and testimony (204a-205a) make it quite clear that the premises from which the actuary proceeds are decided upon by the parties he advises. For example, the Segal Company' redetermination states that "The joint labor-management board of trustees" appointed by the Industry and the unions "proceeded, with actuarial advice, to put into effect a pension plan . . ." (107a); that "The actuarial assumptions . . . having been agreed upon, the actuary proceeded to determine

---

to hypothetical, infinite future generations of Breyer-Newark employees. While it might be contended that the words "discontinuance of operations" suggest that the focus was on the loss of jobs to the Industry, that would render surplusage the additional phrase, "the termination of employees". If one focuses on the phrase "termination of employees" and accepts the entire phrase as a reference only to the particular individuals that would be thrown out of work, the reference to "discontinuance of operations" does not become surplusage. It serves to distinguish terminations, such as quits and discharges, that might have occurred between April 25, 1968 and November 2, 1968 (the closing date) for reasons other than the discontinuance of operations. Furthermore the other provisions focus on the particular employees, *i.e.*, severance pay and seniority rights (303a-304a).

. . ." (*id.*); that the actuary "would advise the trustees to take steps . . . [or] would advise the trustees, in accordance with their preference, . . ." (110a); and so forth. The Segal Company acknowledged specifically that the assumption as to the Pension Fund's perpetual existence and the decision based thereon that it was not necessary to amortize the Pension Fund's liability for past service was something which "the trustees", that is to say the employers and the unions, "decided" (109a). If at any point the Segal Company concluded that this assumption was not justified in light of the Newark closing and believed that amortization was required, it could have so advised the parties,* but it could not have changed their assumption.

Nor in the circumstances could the unions have understood Kraftco to be agreeing to give the Segal Company the power to go beyond its role as actuary and to exercise discretion to alter the Pension Fund's assumptions for purposes of the actuarial study involved. As actuarial consultants to the Pension Fund, the Segal Company stood in such a relationship to it that, if vested with such discretion, the likelihood that it would exercise it against the interests of Kraftco would have been too great. Kraftco obviously saw the Segal Company as being engaged to apply its expertise to a question susceptible to resolution by actuarial science, and the unions, which stress the Segal Company's impartiality (*e.g.*, P.Br. 35), could not have assumed otherwise.

The finding of Judge Lumbard—which was in accord with Judge Tyler's construction of the agreement—that general interpretive powers and discretion to vary prior

---

* The Segal Company came to no such conclusion about the Newark closing. In its report on the Pension Fund as of May 1, 1968, which was presented after it had completed its original calculation, the continued reasonableness of the assumption was specifically endorsed (K. Br. 14-15, footnote).

understandings were not conferred upon the Segal Company (229a-230a), is consistent with the language of the Breyer Agreement and is fully supported by the evidence.

C. Plaintiffs' Legal Arguments

The plaintiffs contended at trial that the parol evidence rule precluded consideration of evidence with regard to the circumstances of the Breyer Agreement because, allegedly, the parties' intent was clearly expressed in the writing. Judge Lumbard rejected the contention (229a-230a), as had Judge Tyler (94a), because the parol evidence rule applies only to evidence which would vary the meaning of the writing. In this regard Professor Corbin has stated:

> Among the surrounding circumstances that are admissible for purposes of interpretation are included many acts and statements of the parties antecedent to and contemporaneous with the making of the contract. But, it may be asked, does not the 'parol evidence rule' exclude evidence of such antecedent statements and understandings? The answer to this question is No. That supposed rule of evidence purports to exclude testimony only when it is offered for the purpose of 'varying or contradicting' the terms of an 'integrated' contract; it does not purport to exclude evidence offered for the purpose of interpreting and giving a meaning to those terms. (3 *Corbin on Contracts*, § 543, at 130 (1960)).

The evidence adduced at trial was offered for this purpose.

Since the language of the contract here was ambiguous, plaintiffs get no support from cases dealing with unambiguous language. *Eskimo Pie Corporation* v. *Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968) dealt

with the question whether parol evidence was admissible to show that the contracting parties intended a license agreement described as "non-exclusive" to confer "exclusive" rights with exceptions for certain licensees. Judge Mansfield found that the term "non-exclusive" in a licensing context had a definite meaning and that it could not be understood as precluding the grant of other licenses. He gave the following definition:

> An "ambiguous" word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. (284 F. Supp. at 994).

Here the Segal Company and Kraftco's expert, who were both cognizant of the customs, practices, usages and terminology of actuarial science, both found the Breyer Agreement's language to be capable of more than one meaning (78a-81a, 122a-123a, 206a-208a). Judge Lumbard's finding to the same effect is unassailable.

Plaintiffs' extended arguments based upon arbitration and appraisal decisions (P.Br. 44-56), and the absence of proof of fraud or misconduct (P.Br. 57-59), are also beside the point. These arguments seek to have the question of the *scope* of the Segal Company's authority under the Breyer Agreement decided on the basis of language that states the *effect* of a proper exercise of the authority conferred. The Segal Company was selected to serve as an actuarial expert. It was given the power to make a "final and binding" actuarial decision on the matter the parties submitted to it; it had no power to decide what the parties intended to submit. The distinction is illustrated by *Pat J. Murphy, Inc.*

v. *Drummond Dolomite, Inc.*, 214 F. Supp. 496 (E.D. Wis., 1963), *aff'd* 346 F.2d 382 (7 Cir., 1963). That case involved a construction contract which gave the owner's engineer final and binding authority to resolve certain disputes arising under the contract, but it was held that he did not have the authority to determine the meaning of a term in the contract.

The kind of unreviewable authority for which plaintiffs contend is not conferred by language giving an actuarial consulting firm final and binding authority to make an actuarial study. Even in arbitration cases, the courts are sensitive to their obligation to enforce limitations which the parties' agreement places on the arbitrator's authority; appraisers represent an *a fortiori* case. In the *Matter of Dimson (Elghanayan)*, 19 N.Y.2d 316, 280 N.Y. Supp.2d 97 (1967), which plaintiffs cite, the Court of Appeals engaged in a careful analysis of a complex agreement, and the business context in which it was written, precisely in order to determine whether or not the parties' agreement had withdrawn a particular issue (as to the value of certain real estate) from an arbitrator empowered to act under the following broad arbitration clause:

> Any dispute or controversy arising out of this agreement or relating to any term or provision hereof shall be submitted to arbitration in the City of New York in accordance with the rules then obtaining of the American Arbitration Association. (19 N.Y.2d at 320-21).

The court held that the issue was not subject to the arbitrator's authority under this clause but was reserved to a real estate appraiser. The case thus stands for the proposition that the scope of the authority which an agreement gives an arbitrator will be closely analyzed where the facts require.

The court's statement in *Dimson* that a party dissatisfied with the results of an appraisal has no greater right than one would have to attack an arbitrator's award, assumes that the appraiser and the arbitrator each acted within their authority. Judge Lumbard so held (245a, fn.) and Kraftco does not contend to the contrary. But Judge Tyler was right in saying that the statement is *dicta* because the appraiser's valuation was not in issue in the case; the *dicta* was also "imprecise" if plaintiffs think it can be read as supporting the proposition that the law gives appraisers broader authority than contracting parties agree to confer.

II

On the Cross-Appeal, Plaintiffs Have Completely Failed To Answer Kraftco's Showing That Judge Lumbard Erred In Failing To Find That the Kraftco Interpretation Was the One Intended.

In its brief on the appeal, Kraftco showed that each of the three points advanced by Judge Lumbard in support of the alternate interpretation of the Breyer Agreement involved clear error: (1) he misread the Swift Agreement (K.Br. 35-38), (2) he attached significance that was not present to a dollar amount in an actuarial exhibit which he had not received in evidence (K.Br. 38-41), and (3) he accepted at face value, and was obviously influenced by, the Segal Company's argumentative assertion that the alternate interpretation was first suggested by Kraftco's actuary (K.Br. 41-43). He also failed to appreciate that the obligation to be consistent with the basic Industry assumption, which he found precluded the original Segal Company interpretation (243a), also ruled out the alternate interpretation, and he failed to consider other uncontested

evidence to the same effect (K.Br. 43-45). Kraftco further argued that this Court should hold that the Kraftco interpretation was correct, and modify the judgment accordingly, because the Swift precedent and all the other evidence of the parties intent supported the Kraftco interpretation.

Plaintiffs' principal argument is that, even if the Breyer Agreement did not give the Segal Company broad interpretative powers, Judge Tyler conferred such powers when, after vacating its original determination, he directed that the redetermination under the agreement be conducted "as if it were an arbitration", and that the Segal Company was thereafter able to come up with an alternate approach free of judicial review (P.Br. 59-62).

Obviously, Judge Tyler could not by a procedural order change the character of the parties' agreement. The Segal Company's authority had its roots in the Breyer Agreement and the court's power and responsibility to construe its meaning were not limited by Judge Tyler's decision to take advantage of the procedures available under Article 76, CPLR. Furthermore, it is clear that he intended no such thing; his March 24, 1971 order contemplated that the redetermination would be reviewed by the court after it was completed (98a-99a).

With regard to the Swift situation, plaintiffs do not attempt to defend Judge Lumbard's reading of the Swift Agreement as justifying his conclusion that the Swift closing involved merely the interruption of contributions to the Pension Fund. Their answer is to insist that Judge Lumbard should not have considered the Swift Agreement at all (P.Br. 62).

Judge Lumbard found that despite plaintiffs' contentions to the contrary it was clear that the plaintiffs and Kraftco shared the understanding that the Swift situation pro-

vided a model for the Breyer Agreement. The evidence is overwhelmingly to this effect (232a-239a). The only effort plaintiffs make to cut the link between Swift and Breyer is the argument that union proposal 34 was not accepted by the Industry, and that as a result Mr. Cohen's elaboration of the intent of proposal 34 in terms of the Swift situation is irrelevant to the Breyer discussion on April 25. They state (P.Br. 62), "Not a word of testimony supports the incorporation of Union Proposal 34 or the Swift Agreement into the Breyer Agreement."

The Segal/Parsonnet meeting on April 11 was one of the discussions leading up to the Breyer Agreement and the Swift situation was in the forefront of that meeting (K.Br. 19-21). In the Breyer discussions on April 25, the unions' request in the pension area was that union proposal 34 be accepted in connection with the Breyer closing and, essentially, this is what was ultimately done (K.Br. 21-25). This is confirmed by the fact that on April 26, Mr. Cohen told the Industry negotiators that the unions were withdrawing union proposal 34 "except as to Breyer's" (318a).*

The evidence therefore overwhelmingly supports Judge Lumbard's conclusion that the Swift situation sets the context within which the Breyer Agreement must be construed. But he erred in his analysis of the Swift situation. There is no basis in the Swift Agreement, or elsewhere

---

* Although plaintiffs insist that the discussions of Swift and proposal 34 in the Industry negotiations were entirely irrelevant (P.Br. 62), they cite a statement attributed to Mr. Cohen in those negotiations in support of their argument that the Segal Company was free to act as it wished (P.Br. 27-28). Whatever way the statement relied upon may be construed, it was qualified by subsequent discussions (317a) and Judge Lumbard's finding that the authority contended for was not present was based upon a consideration of all of the conversations (235-237a) and the other relevant evidence.

in the record, for viewing the Swift closing as having involved merely an interruption of contributions as opposed to an alleged permanent loss in the Breyer situation. On April 17, 1968, long after the Swift Agreement was fully performed, Mr. Cohen described the Swift situation as a case "where contributions are not made for the length of time contemplated" (2317a).

To the argument that Exhibit R for identification was erroneously considered by Judge Lumbard (K.Br. 38-41), plaintiffs make no response. The finding with respect to this document, which Judge Lumbard relied upon in reaching his decision (242a), receives only passing mention in plaintiff's brief (P.Br. 32). Plaintiffs offer no defense of the finding as such or its relevance to the decision.

Judge Lumbard's finding that Kraftco's actuarial expert originally suggested the alternate interpretation is not relevant. However, Judge Lumbard found relevance in it (243a-245a). Kraftco therefore pointed out that the Segal Company was fully aware of the alternate approach before Kraftco's actuary came on the scene and that it was misleading for the Segal Company to imply that Kraftco's actuary was the source of the interpretation (K.Br. 41-43). The plaintiffs do not disagree; they merely dismiss the matter as an argument between Kraftco and Judge Lumbard (P.Br. 29, first footnote).

Likewise, no response is made to the point, based upon the equivalence in the parties' minds of union proposal 34 and the Breyer Agreement, that the alternate approach could not have been intended because, having been advertised by the unions as a "non-controversial proposal . . . with no gimmicks" (311a), proposal 34, and therefore the Breyer Agreement, could not reasonably be construed as calling for, in the one case, a guarantee by the Industry of

the unfunded liability of the Pension Fund, and, in the other, a partial guarantee of such liability by Kraftco (K. Br. 44-45).

III

Even If Judge Lumbard Were Correct in Finding That the Alternate Interpretation Was Intended, Kraftco Was Entitled to a Hearing on Its Application For Modification of the Actuarial Study Which the Segal Company Made in Purported Compliance With Such Interpretation.

Judge Tyler's election to "take advantage of the latitude offered by N.Y. CPLR § 7601" and treat the Breyer Agreement "as if it were an arbitration agreement" (95a) did not create an arbitration agreement where none had existed before. But it did make the redetermination subject to the procedural incidents of arbitration under CPLR Article 75. Therefore, when the redetermination was issued by the Segal Company, Kraftco had the right under CPLR § 7509 to seek modification of the redetermination before the Segal Company on any ground upon which modification of an arbitrator's award might be sought in court under § 7511 (c), including the grounds that "there was a miscalculation of figures" or that the Segal Company awarded on "a matter not submitted" which could be "corrected without affecting the merits of the decision upon the issues submitted" (*id.*, subparas. 1 and 2).

Kraftco made timely application for modification of the redetermination in two respects and alleged that the modifications were of the type that could be made to an arbitrator's award (129a-133a). When trial became imminent the application was withdrawn by stipulation on a no

prejudice basis (134a-135a) and the issues were reserved for the trial if they were reached. Since the redetermination was based upon the alternate interpretation of the Breyer Agreement the application proceeded upon the assumption that the alternate approach was the one intended. Accordingly, the issues raised would only be reached at trial if that approach were held to be the one intended.

At trial, Judge Lumbard found the alternate interpretation consistent with the intent of the parties, but without discussion of their nature, he dismissed the issues raised by Kraftco's application to modify as not open to judicial review because, allegedly, they were not based upon any inconsistency between the redetermination and the court's construction of the language of the Breyer Agreement (245a, fn.).

However, both of the modifications sought by Kraftco *are* predicated upon claims of inconsistency between Judge Lumbard's construction of the contract language and action taken by the Segal Company in purported compliance with that construction, and the inconsistencies alleged are present in fact.

A. The Inclusion of Distribution Employees in the Calculation Was Inconsistent With the Alternate Interpretation

The only Breyer-Newark operation that was terminated was the *production* of ice cream. Assuming, as Judge Lumbard found, that the Newark closing was thought of by the parties as involving a permanent loss of positions to the Pension Fund's actuarial base (242a), the only positions that were so lost were *production* positions. The closing may have caused individual Newark distribution employees to leave Kraftco's employ. But the distribution function

survived at Edison, New Jersey. Thus, the Segal Company's inclusion of 10 distribution positions in its calculation was not "consistent . . . with the court's construction of the language of the agreement" (245a, fn. 8).

Plaintiffs do not attempt to deny that there is an inconsistency between the Segal Company's redetermination and the alternate interpretation of the Breyer Agreement. They say that Kraftco is arguing that the Segal Company made "an inaccurate count of the employees involved" (P.Br. 63), and go on to assert, without reference to authority, that such a miscalculation cannot be corrected (P.Br. 67-68).

CPLR § 7511(c)(1) is quite clear that a "miscalculation of figures" can be corrected. *Weiss* v. *Metalsalts Corp.*, 15 A.D.2d 46, 222 N.Y.S.2d 7 (1st Dep't 1961), *aff'd*, 11 N.Y. 2d 1042, 230 N.Y.S.2d 32 (1962), concerned a proceeding for confirmation of an arbitrator's award of damages for wrongful discharge under an employment contract to buy and sell stock of the respondent corporation, and for specific performance thereof. As to the figure arrived at by the arbitrator for the value of the appellant's performance, the court noted that:

> Respondent [the corporation] claims that this is an obvious error or miscalculation. It is quite possible that it is. The contract states the purchase price in a separate paragraph, stating the par value in the description of the shares. If we could be certain that this is an error of calculation, we could correct it. (15 A.D.2d, at 47, 222 N.Y.S.2d, at 8)

Since the court was uncertain whether a miscalculation had in fact occurred, it remanded the case to the arbitrator for "further consideration and disposition." (15 A.D.2d at 48, 222 N.Y.S.2d at 8). See *Fudickar* v. *Canadian Mutual Life Ins. Co.*, 62 N.Y. 392 (1875).

The difference involved is no mere quibble; the 10 extra employees constitute 20% of the employees taken into account by the Segal Company and unquestionably their presence had a comparable percentage impact in the dollar amount calculated under the alternate method. Kraftco was entitled to a hearing on the point, and a decision in its favor.

B. The Calculation of a "Lump Sum" Was Inconsistent With the Alternate Interpretation

Here again, Kraftco argues that the Segal Company went beyond the scope of the Breyer Agreement as construed by the court. Judge Lumbard held (1) that the assumed loss of positions to the Pension Fund's actuarial base deprived it of the portion of the future contributions in respect of such positions that would have been available "to cover interest on the unfunded accrued liability" (242a), but (2) that, at the same time, it was clear from the circumstances that the parties did not intend "to fund part of the unfunded accrued liability" (243a).*

---

* Although they challenge Judge Tyler in virutually every other respect, plaintiffs try to make much out of his failure to accept Kraftco's alleged contention that "the unfunded accrued liability should play absolutely no part in the determination of 'impact' of the plant closing" (P.Br. 61). More precisely, Kraftco's position was that the Breyer Agreement could not be construed as discarding for purposes of the study the Pension Fund's basic decision not to effect amortization of the unfunded liability and the necessary implications of that decision. Judge Tyler accepted this position (94a), as did Judge Lumbard (243a). It therefore overstated Kraftco's position to say that it thought the unfunded liability should "play absolutely no part". For as the Segal Company has pointed out (109a-110a), the size of the unfunded liability is not fixed, except in theory; it varies as a function of the ever changing balance between the value of the present and future assets on the one hand and the value of future benefits on the other. The essence of the study involved in the Kraftco interpretation is to determine how much money is required to prevent the closing from causing an increase in the unfunded liability of the Pension Fund.

The Segal Company was consistent with the first holding; it calculated the portion of future contributions that would theoretically have been available to cover interest on the unfunded liability, *i.e.*, $16,200. But it acted inconsistently with the second holding by deciding that Kraftco should fund the unfunded liability rather than arrange to pay the lost interest.

Plaintiffs' answer to the point is to accuse Kraftco of arguing that it only has to pay $16,200 per year and need never "liquidate" the obligation (P. Br. 63-67). However, the argument is really "that there are much cheaper ways for Kraftco to finance [*i.e.*, liquidate] that kind of obligation than to deposit a principal sum at 3% interest" (K.Br. 46).

For example, at an interest rate of 6%, $186,000 would purchase an annual payment (or annuity) of $16,200 a year for 20 years. At the same time, $180,000 invested at a compound interest rate of 6% would accumulate to over $576,700 in 20 years. Thus, at a 6% rate a current investment of $366,000 would give the Pension Fund $16,200 per year for 20 years and at the end of the same 20 years enough assets to continue to earn the $16,200 in perpetuity even at the Pension Fund's 3% interest rate. If an 8% interest rate could be obtained, the 20-year $16,200 annuity would cost less than $160,000 and only $125,000 would have to be invested at compound interest.

The point is that Judge Lumbard held that Kraftco agreed to offset the loss of future interest—which the Segal Company calculated at $16,200 per year—but not by presently funding so much of the unfunded liability as would be necessary at a 3% rate to reduce the annual interest burden by that amount. The Segal Company went beyond the agreement by directing that Kraftco fund the

unfunded liability to that extent. Modification was therefore required and Kraftco was entitled to a hearing at which an appropriate method of meeting the obligation could be determined.

Mr. Elkin clearly stated that the Segal Company's calculation of a lump sum liability for Kraftco did not carry with it the presumption that it necessarily be paid in a "lump sum" (115a-116a). Plaintiffs argue that this remark was intended only to relate to a lump sum calculated under the original approach (P.Br. 65). This is clearly not so. Mr. Elkin said that the original and alternate methods were identical in all respects save for the former method's disregard of the agreement to pool experience (122a) and the logic of Mr. Elkin's two statements (27a-28a, 116a) clearly extends to both situations.

In any event, Kraftco was entitled to a hearing on whether it could arrange to offset the adverse actuarial effect under the alternate method at a saving of upwards of $200,000 without varying the actuarial conceptions involved in the alternate interpretation of the Breyer Agreement.

CONCLUSION

The cross appeal of the plaintiffs should be denied. Kraftco's appeal should be granted and the judgment should be amended or, in the alternative, vacated in accordance with its request (K.Br. 48).

Respectfully submitted,

SULLIVAN & CROMWELL,
Attorneys for Appellant-Appellee
Kraftco Corporation,
48 Wall Street,
New York, N. Y. 10005
(212) 952-8100

JOHN F. CANNON
Of Counsel

August 30, 1974

2 Copies received 8/30/24
Cohen Weiss and Simon
Attorneys for Plaintiffs
by Stanley M. Brown